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IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1940

No. 99

FIRST WISCONSIN TRUST COMPANY, AS TRUSTEE UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935,

Appellant,

vs.

WISCONSIN TAX COMMISSION, JOHN C. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY; STATE OF WISCONSIN, WISCONSIN DEPARTMENT OF TAXATION, AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Respondents,

JURISDICTIONAL STATEMENTS.

Appellant presents with its petition for the allowance of an appeal to the Supreme Court of the United States, from the judgment of this Court entered on the 4th day of June, 1940, the following separate statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal, to review the judgment in question.

(a) The statutory provisions believed to sustain the jurisdiction are Section 344 (Judicial Code, Section 237

amended) of Title 28 of United States Code Annotated, and specifically that part of said section which provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of the statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

Section 861a Title 28 United States Code Annotated:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall thereafter be obtainable by appeal."

Section 861b Title 28 United States Code Annotated:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

(b) The Statute of the State of Wisconsin, the validity of which is involved, is Section 4, Chapter 363, Wisconsin Session Laws of 1933, which is set forth at pages 795-800, of said Session Laws, as amended to extend the time of the operation of the law to July 1, 1937, by Section 7, Chapter 15, Wisconsin Session Laws of 1935, as set forth at page 30 of said Session Laws.

The pertinent provisions of the statute as amended are as follows:

> Section 4. Emergency Gift Tax. (1) An emergency tax is imposed upon transfers of property, real, per-

sonal or mixed, or any interests therein or income therefrom in trust or otherwise, to any person, association or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided:

(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a non-resident of the state at the date of such gift.

(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.

(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

(b) All transfers to the same donee by the same donor within the same calendar year shall be added together and the aggregate of such transfers shall be considered as one transfer for the purposes of taxation under this chapter, and the rates of tax hereinafter prescribed shall be applied to the aggregate of such transfers made within the same calendar year.

The remainder of the statute is summarized as follows: The rates are graduated according to kinship, and are progressive in accordance with the amount given to the same donee.

Gifts to certain municipal and charitable institutions are exempt.

Personal exemption are allowed to each donee in variable amounts depending on kinship and the amount of the gifts.

Donor and donee must each file a return, and the assessment is made by the Assessor of Incomes of the assessment district in which the donee resides.

(c) The date of the judgment sought to be reversed is June 4, 1940, and the date upon which the application for appeal is presented is June 20, 1940.

(d) The gift was made at Chicago, Illinois, by a resident of Wisconsin to a Wisconsin corporation, represented in Chicago by its President, in trust for residents of Wisconsin, by actual delivery at Chicago, Illinois, of silver dollars.

In the suit there was drawn in question the validity of said Emergency Gift Tax Act on the ground that it was repugnant to Section 1 of the XIV Amendment to the Constitution of the United States if construed and applied as imposing the tax on such transfer of silver dollars, because the State of Wisconsin lacked jurisdiction to tax such transfer, and to do so would deprive appellant of property without due process of law.

The decision of the Supreme Court of the State of Wisconsin, which is the highest court of the State in which a decision in the suit could be had, was in favor of the validity of said statute construed as imposing the tax on such gift.

Such decision brings the case within the jurisdictional provisions relied on as held in *Frick* v. *Pennsylvania*, 268 U. S. 473, at page 501.

(e) The question presented by this appeal is the basis of jurisdiction, if any, for a State to impose a gift tax on a transfer, by gift or for an inadequate consideration, completely consummated in another State.

Appellant contends that jurisdiction to impose a gift tax is the same as jurisdiction to impose a sales tax, stock transfer tax, or other similar tax imposed upon the exercise of a right or privilege in a State selected by the parties, and that such State has exclusive jurisdiction to impose such a tax, irrespective of the domicil of the parties and whether or not the property transferred is merely within such State temporarily.

Jurisdiction to impose an annual property tax is not analogous. Such tax is not imposed in respect to a single event, but for the protection ordinarily afforded during the year by the State of domicil of the owner, and such State, rather than several States in each of which the property might be temporarily located during the year, rightfully imposes the tax.

Jurisdiction to impose an inheritance or estate tax in respect to a gift made in contemplation of death is not analogous, because the basis of such jurisdiction is not jurisdiction of the gift, but jurisdiction of the estate of the decedent, with the right to condition the succession thereto on payment of a tax measured by the gift, even though made in another State, provided, that, looking through form to substance the condition is reasonable when viewed in the light of the effect of the gift and the circumstances surrounding the making thereof.

We know of no case as yet considered by the Supreme Court of the United States which involves the jurisdiction of a State to impose a gift tax on an ordinary gift *inter vivos*, completely consummated in another State, nor any case in which jurisdiction to tax is predicated not on actualities, but on the assumed substance of the transaction.

(f) The Federal question sought to be reviewed was raised by appellant at the outset in a rider attached to its gift tax return, and in the protest, after the assessment, to the Milwaukee County Board of Review, both documents being incorporated in the record made before such Board of Review.

The Wisconsin Tax Commission reviewed the record and affirmed the assessment.

Appellant, in order to obtain Court review of the assessment, was required by the statute to specify its objections to the assessment and its assignments of error.

Appellant, in its appeal to the Circuit Court of Milwaukee County, Wisconsin, specified its objections as follows:

> "(2) If said Act is construed as imposing a tax on this gift it would deprive appellant and the beneficiaries whom it represents, of property without due process of law, contrary to the XIV Amendment to the Constitution of the United States:
>
> (a) Because Wisconsin has no jurisdiction to impose a gift tax either upon the donor or donee in respect of a gift made in Illinois of tangible personal property there located;"

and assigned as error that

> "(2) In holding that said statute so construed would be constitutional and not void by reason of the lack of jurisdiction of Wisconsin to impose a gift tax on such transaction."

The Circuit Court for Milwaukee County, Wisconsin, affirmed the assessment in a decision which discusses this question.

Appellant, in its appeal to this Court, made the following assignments of error in its brief:

> "(2) The Act, if construed as imposing gift taxes upon these transfers, is unconstitutional because:

(a) The State of Wisconsin lacks jurisdiction to impose gift taxes upon gifts *inter vivos* made without the state;"

This assignment of error is more clearly stated in the brief as follows:

"The Gift Tax Act, if construed contrary to its express terms, as imposing a gift tax on such transfers without the State would be invalid because such a tax would deprive the taxpayer of property without due process of law as prohibited by the XIV Amendment to the Constitution of the United States."

The assessment was affirmed by the Supreme Court of the State of Wisconsin in its decision. The opinion of the Supreme Court of the State of Wisconsin is printed as an appendix to the jurisdictional statement in the case of Van Dyke *et al. v.* Wisconsin Tax Commission, No. 265, October Term, 1940, and is not reprinted here.

Dated, Milwaukee, Wisconsin, June 20, 1940.

DOUGLASS VAN DYKE,
Attorney for Appellant.